[Written for the MINER.]

To Fighting "B" Troop, 8th Cavalry.

BY W. H. B., OR P. H. F.

Come all you wearied soldiers, who live on pork and With plenty of hard work to do, and very slender means, Come listen to my diffy, a song to you fill sing. "Tis of a troop, a gallant troop, that makes the welkin ring.

You Arizona heroes, ye men of scalping fame. Who bunt Apaches for and near, over Arizona's plain, Come, give three cheers for gallant "B," led by bold Somerby,
The source and dread of red-akinned imps, and flower of

For many years our savage fees have pilfered, burnt and And shed the best and bravest blood of Arizona's plain;

Then, here's to our defenders, those gallant men and true. Of gallant "B," Eighth Cavalry, the fighting lads in blue Here's a health to Sergeant Golding, to tiurke and Wortman, too.
To Daly and O'Callaghan, and all the fighting crew,—
Not forgetting Little, that veteran branzed and true.
With bugie slung behind his back, to wake the boys in

Then, let us \$11 the goblet, and drain it to the lee, And drink a health to heroes, is dashing Somerity, The Bee that stings in Spring and Fall, and all the year And thins the breed of red-skins on Arizona's ground,

If all would try, as doth this band, to keep our friends un-Our farmers, then, might safely log along the roads dis-

No weeping maids, no orphan babes to ery to Heaven in But peace and plenty, sure, would reign, o'er Arizona's

No recking sculps, no headless trunks, no smouldering Where painted inps their revols kept, and Christian blood did flow. Where ere und see fought, bled and died, and woman

in to the fieudish will of incarnate fiends of hell.

May Mars, great goal of battle, protect you in the fight. Shield you all from harm, and herve your arms o Likewise your young commander, long may be live to

And win fresh wrenths of laurel, -a successful warrior's

Territory of Arizona, at the Relation of the Attorney-General vs. Oscar Buckalew, Recorder of the County of Pima.

In the District Court of the First Judicial District.

Opinion of the Court, by Judge Backus.

This is a proceeding in the nature of a Quo Warranto, against the Respondent, Oscar Bucka-lew, as Recorder of the County of Pima. Like proceedings of this nature at Common Law, its effect and operation is to try the legal right of the Respondent to the office in question. The regulations of the Code touching this remedy affect only the practice, the mode of proceeding press the complaint in the nature of an information, and the answer instead of the information and subsequent pleading, as at Common Law, leaving the law of the case to be settled by the same rules as to right as before the change of remedy. The only material change, therefore, affected by the is simply astotheremedy. The mode of proceeding giving the complaint, which is in the na-ture of an information, but differing from that in setting out the whole case of the Relator, to be the answer of the Respondent in the nature of a plea, admitting, denying or avoiding the matter so set out in the complaint, instead of, as nder the practice at Common Law, making the full case by the replication and rejoinder. issue is now made by the complaint and the answer, the force and effect of which are to be settled and determined by the rules prescribed by the Code. The case was brought on to hearing on the complaint and answer, without any testimony on either side. The case, therefore, for the dec sion of the Court, arises upon the record and the law and facts therein exhibited by the pleadings. The information sets forth that, by the Organic Act of the Territory, the First Legislative Assembly was, on a census to be taken by the Governor, to be apportioned by him, and to be elected, at and place, and in such manner, as should be by him prescribed, but that, thereafter, the time, place and manner of holding and conduct-ing all elections by the people, as well as the apportionment of the Representatives in the Legis-lature, among the several counties and districts, should be prescribed by law. The complaint fur-ther sets forth that the First Legislative Assembly of the Territory, by An Act, approved November 10, 1864, purported to delegate to the Governor the power to apportion the members of the Legislature among the several counties, which, by the Organic Law aloresaid, was, after the First Legislature, to be prescribed by law; that said legisla tive act is in direct violation of said Organic Law of the Territory, and, therefore, void. The complaint further sets forth and avers that the Governor, under color and by virtue of the authority so purported to be delegated to him, as aforesaid, by the said pretended Act of the 10th of November, 1864, a.d in violation of the Organic Law aforesaid, did, by his proclamation of the 9th of July, 1866, purport to make an apportionment of the members of the Legislature, among the several counties of the Territory, as follows (viz): To Pima county, 3 members of the Council and 8 members of the House; to Yuma county, 1 member of the Council and 3 members of the House; to Mohave county, 1 member of the Council and 1 member of the House; to Pah-Ute county, 1 member of the Council and 1 member of the House, and, to Yavapai county, 3 members of the Council and 5 members of the House. The said complaint further sets forth and avers that the said several counties of the Territory, in accord-ance with the apportionment above set forth, did elect the members of the Legislative Assembly of the Territory, making and composing what is called and designated the "Third Legislative As-sembly of the Territory," which said Legislative Assembly was convened on the 3d day of October, Assembly was convened on the 5d day of October, 1866, that among the Acts purporting to be passed by said Legislative Assembly was An Act amendatory of Chapter 24 of the Howeli Code, entitled, "Of General Elections," changing the time of holding said general elections from the first Wednesday in September, in each year, to the first Wednesday in June in each year. The complaint further sets forth and avers that the said Respond. further sets forth and avers that the said Respondent, Oscar Buckalew, holds his office of Reof the County of Pima, and exercises the functions thereof, under the color of and by virtue of his pretended election to said office, at an alleged election held on the first Wednesday of June, 1867. that said general election, held on the said first Wed-nesday of June, 1867, was without warrant or an-thority of law, and in violation of the Organic Act of the Territory, and, therefore, null and void. The information then prays judgment of removal against the said Respondent, as exercising the functions of Recorder without authority of law.

The Respondent, by his answer to the complaint and its averments, as above set forth, sets up that G. H. Oury, who prosecuted in behalf of the Territory, is not legally Attorney-General or District Attorney for the County of Pissa, but that he illegully holds and exercises the functions of said of-fice; all of which is set up in the most general terms. This part of the answer, on motion of the Relator, was stricken out, as impertinent and frivolous, and raising no issue of law or fact that could be tried in this case. The residue of the Respondent's answer denies, in the most general terms, that he bolds or exercises the office of Re-corder illegally, and, in like general terms, avers that he holds and exercises the functions of said office by virtue of the laws of the Territory, but, mishout setting out how, avers that he was elected

at a general election held on the first Wednesday of June, 1867, in accordance with the proclamation of the Governor, dated at Prescott, May 4, 1867; that on the first day of July, 1867, he gave a bond, as requird by law, without setting out how, or that he ever otherwise qualified by oath of office or otherwise, and, finally, by his said shawer, again denies that he is exercising the office of Recorder, or using its functions, in violation of law, but, on the contrary thereof, that he is so doing by virtue of law. This answer of the Respondent, if viewed as a pleading at Common Law, is radically defective both in form and substance; presenting no triable issue, averring facts defectively and evasively, and also matters of law, without the facts upon which the law arises, to be determined by the Court, and not the pleader. If viewed as an answer, under the Code, it is equally defective. Without saying anything of its lack of form, it contains no specific denial of the material allegations of the complaint sought therein to be con-troverted by a general denial of matters of law and fact combined. According to the rule of pleading prescribed by the Code, every material allegation of the complaint, not specifically met and controverted by the answer, is, for the purposes of the proceeding in which it occurs, mission of the truth of all such matters. -(Howell Code, p. 305, § 65.) The answer, therefore, admitting some allegations of the complaint, name The time of the election, the first Wednesday of June, 1867, and specifically denying none, op erates, under the Code, as an admission of what is alleged in the complaint. What, then, does the complaint allege as uncontradicted by the answer? It, in substance, alleges that the Respondent holds and exercises the functions of the office of Recorder of the County of Pinus, by virtue of a protended election at a general election held in that county on the first Wednesday in June, 1867, which election was so held o , that day, under olor of what purports to be An Act of the Third Legislative Council of the Territory, convened or the 3d day of October, 1866, which purported to change the time of holding the general election of the Territory from the first Wednesday in Sep-tember, in each year, as fixed in the Howell Code by the First Legislative Council, to the first Wed nesday in June, in each year; that the members of both houses of said Legislative Council were elected from the several countles of the Territory as they had been apportioned to the said several countles by the Governor of the Territory; that the Governor, in making such apportic purported to act under color of Au Act of the First Legislative Council, approved November 10, 1864, purporting to delegate to him such authority; that the Organic Law of the Territory specially authorized and empowered the Governor to prescribe the apportionment of members to the several counties, and the time, place and manner of their election, for the First Legislative Council, but expressly providing that, thereafter, the time, place and manner of holding and conducting all elections by the people, and the apportionment of the Representatives to the several counties, in the Council and House of Representatives, should be prescribed by law. This state of the case, as

made by the comptaint, the answer admits, first, affirmatively, by expressly stating the election of the Respondent to have been had on the day set up in the complaint, and, second, in failing, speci-ficulty, to deny the other allegations therein. By operation of law, therefore, the same are all admitted, as stated in the complaint. No proof was taken in the case, and none was necessary, nor, indeed, was any admissable, the whole case arising on the record, as made by the pleadings. the case, as made by the record two material questions present themselves for the consideration of the Court. 1st. Was the election held at the time specified in the record a legally valid election? or, to state the question more clearly, no other question being presented by the record as to the validity of said election, except as to the time of its holding. Was the Act of the Third Legislative Council, of the year 1866, that purported to change the time of holding the general election from the first Wednesday in September to the first Wednesday.

vened in the year 1866, that purported to enact that law, any legislative power, or had the legislative power of the Territory lapsed? Or, to state this question more clearly, as no other question is presented by the record as to the legislative power of that Council but the apportionment of the same by the Governor, was this apportion-ment of the Third Legislative Council by the Governor a compliance with the Organic Act, and a competent, valid the disposition of these questions, raised by the record, I will first consider the second, for, if that is answered in the negative, the first is thereby disposed of as showing the legislative act in question invalid and inoperative as law, from the want of legislative power in the body that purported to pass it. First, then, was the apportionment of the Third Legislative Council, by the Governor, a compliance with the Organic Law, and a competent, valid act under its provisions? The duty wich the Court is here called upon to perform is clways one of great delicacy, and the power which it brings into activity is only to be exercised in cases entirely free from doubt. The question here presented, and which lies at the very threshold of the inquiry, is one of the very gravest importance that has arisen, or ever can arise, touching the present or prospective condition and hopes of the

Legislative Council, apportioned, elected and con-

Territory, and whether that power has not iapsed and been lost by the omission or mismanagement of those having it in charge. Under our form of government a Territory, unlike a sovereign hate, has no original inherent sovereignty or political vitality. It is a mere creature of the law, a poli tical corporation, created by Congress under the third paragraph of the fourth article of the Conthird paragraph of the fourth article of the Con-stitution of the United States, giving to Congress power to dispose of and make all needful rules and regulations respecting the Territory or other property belonging to the United States. Although in the organization of Territories their political powers are divided, as in sovereign, constitutional States, yet each of these powers, and all, together, exist only, and are exercised, not in virtue of any constitutional rights or political sovereignty either in the Territory or the people over which they are exerted, but solely in virtue of the Acts of Congress creating them. From the very nature of a Territorial Government, as of a corporation, both the measure of its powers, as well as the method of exercising them, are the mere creatures of law, and, in either case, the law is a delegation

of power and not a limitation of any original power existing in the Territory or corporation thus created. Any other view would hopelessly confound all ideas of order and good government, and all distinction between governments and the instrumentality by which they work. In fine, a Territorial Government is, in its nature, power and capacity, just like a corporation- mere creature of the law that created it, with just such powers and capacity, and no others, and to be ex-ercised in the manner and to the extent, and not otherwise, as pointed out by the law of its creation. The implied powers of either are limited to those only that are necessary to carry out the powers expressly given, with the further limita-tion that, in the exercise of either express or im-

pited powers, no discretion or variance is allowed either in the manner or measure of their exercise, where such manner or measure is defined and where such manner or measure is defined and prescribed by the law of their creation. The following cases illustrate these principles: Goodenow vs. Commissioners of Ramsey County, 11th Kansas Rep., p. 40. City of Leavenworth vs. Rankin, 2d Kansas Rep., 375. People vs. Utica Insurance Co., 10th Johnson's Rep., 358. Halstead vs. Mayor of New York, 3 Comstock Rep., 439. A

body corporate can only act in the way prescribed by the law creating it. 2d Cranch, U.S. Rep., 166. Beaty vs. Marine Ins. Co., 2d of Johnson, 109. Fireman's Ins. Co. vs. Ely. 2 of Cowan Rep., 673 the express provisions of the Organic act requiring this particular duty to be done by the law-making power. If this can be so done, then every legislative function may be delegated, and the whole re-Hoosick vs. the College of Physicians, 5th Wend. Rep., 547. McMasters vs. Reed, 1st Grant Rep., 36. A State is a corporation, State of Indiana

vs. Numan, 6th Hill Rep., 53. Darthmouth Col., vs. Woodward, 4th Whest, 63. Corporate sets must not only be authorized by the charter, but those acts must be done by such officers or agents and in such manner as the charter authorizes. Bank of Augusta vs. Earl, 13 Peters Rep., 587. Chief Justice Marshall, in his elaborate opinion, delivered in the case of Dartmouth College vs. Wookward, above referred to, defines a corporation as "an artificial, invisible and intangible being, existing only in contemplation of law," It possesses only those powers and properties which the law of its creation confers upon it, either expressly or as incidental to its very existence. These general principles are so well settled and established, both upon principle and authority, as rules of action for both private and municipal corporations, that they have become, almost, legal axioms. Keeping these principles in view, we shall be better enabled to consider the main ques-

tion now under consideration.

By the fifth section of the Organic Act the leg islative power and authority is vested in the Governor and Legislative Assembly. This arrange ment of the legislative power, making the Governor, the creature of and the mere agent of the General Government, an integral part of the legislative authority, and giving him a dominating in-fluence over the popular branch, exhibits more clearly the true legal condition of a Territorial government, destitute of political sovereignty, and altogether subordinate to the National Sova mere creature of national legislationby not only subjecting its legislation to the un-controlled discretion of the Governor, the agent and representative of the Federal Government, but subjecting all the acts of the entire leg power of the Territory to the uncontrolled discreion of Congress, to be annulied by the simple dissent of that body. Again, the true character and subordinate condition of the legislative au thority of a Territory is shown and enforced by the fact that, by the Organic Law, the legislative power is not, as in the case of the National Legisature and the Legislatures of the several States, endowed with the capacity finally to decide upon id determine as to the qualification and return of its own members. This question, like every-thing else in the composition of a subordinate ical or municipal corporation rests, for its alidity, on a conformity or non-conformity the law creating the same, to be adjudged by the udicial power of the Government. By the seventh section of the Organic Act, the legislative power of the Territory so composed, subordina-ted and controlled, has its sphere of action defined as extending to all rightful subjects of legislation consistent with the Constitution of the United States and with the provisions of the Organic Act. This legislative power, thus conferred in general terms, would warrant a large discretion as means and measures of legislative action, if unre-strained by other provisions of the Organic Law, to which, however, this general power is especi ally subjected. By the fifth section of the Organic Act, the Governor is specially authorized to set in operation the popular branch of the legislative power, and, to that end, cause a census to be taken, and prescribe the apportionment of members and the time, place and manner of their election for the first Coucil, and with this first Council for any such purpose, his powers terminate and end, for the Organic law goes on and provides in these words: "But, thereafter, (that is after the first council) the time, place and manner of holding and conducting all elections by the people and the apportionment of the representatives of the several counties to the Council and House according to the population, shall be prescribed by law." Of the force and effect of these provisions there can be no doubt, or that the entire powers of the Governor were executed and exhausted, as to prescribing either the apportionment or the time, place and manner of electing members to the Legislature, when the first Legislature was got together; nor can it be doubted that any future body, purporting to be a Legislature of the Territory, the apportionment of which, or the time, manner and place of election of which should be prescribed by the Governor, would be a wholly unauthorized and illegal body and destiday in June, a valid Legislative Act? In fine, had it the force of law? And second, including and tute of any legislative power whatever. It is un-necessary to advert to the policy, as well as uniembracing the question just stated, had the Third form practice of all free governments, to make and maintain the popular branch of the legisla-tive power independent of Executive control and beyond the reach of those influences an Executive might exert, if exercising the power of prescribing either the apportionment or the time, place or manner of electing popular representatives. No State or nation with any pretensions to freedom or free institutions has ever long tolerated such a practice, and the British Crown in periods of its wildest usurpations, never dared to assert such a prerogative in the composition of the pop-ular branch of its Parliament, since that body even pretended to freedom. In view of these principles, Congress, evidently, shaped the provisions of the Organic act by specially authorizing the Governor at the outset, and for the purpose of setting the machine of Government in motion, to prescribe the apportionment of members, and the time, place and manner of their election, for the first Legislature, and, thereafter, forbidding the use of any such power, by specially providing that all such things should be prescribed by law. The conditions precedent to the possible existence of any Legislative Assembly under the Organic law of the Territory are, that the members thereof should be apportioned and the time, place and manner of their election be prescribed by lawful authority. Either of these conditions precedent failing,—that is to say, if the members of the Leg-Territory. It is, too, one in which the Court deeply feels its responsibility, for the question is Islative Assembly are not apportioned or elected of no less magnitude than whether any legislative at a time and piace and in a manner prescribed by lawful authority as prescribed in the Organic law, power now does, or has, since the termination of in whil authority as prescribed in the Organic aw, such body is not a Legislative Assembly of the Territory, and has no legislative flower. What are the facts, as exhibited by the record, under consideration? They are that the apportionment of the members of the Third Legislative Assembly (for the year 1866) was prescribed and made by the Governer. Here there is a manifest conthe Second Legislative Council, existed in the flict between the apportionment in fact and the requirements of the Organic law. But the record further shows that the Governor, in prescribing this apportionnent, acted under color of what purports to be an act of the First Legislative As-sembly of the 10th of November, 1864, authorizing the Governor to prescribe, by proclamation, the apportionment of members of the Legislative ics after the first. Here is a manifest con flict with the Organic law, which expressly requires that all apportionments, after the first, shall be prescribed by law. It is worthy of note, in this connection, that the legislative authority of the Territory, consisting of the Governor and Legislative Assembly, composing the first Legis-lature, were not unmindful of the force and effect of the provisions of the Organic law requiring that after the first Legislature, the apportionment of members for any sul sequent one should be prescribed by law, for by sec. 15, chap 14, of the Howell Code, entitled "Of the Legislature," the apportionment of members for the next or second Legislature is prescribed by that law, and the same is therein declared to be the apportionment, until a different one should be made agreeably to law; but the 18th sec. of the same chapter is the act above referred to that purports to authorize the Governor to make the apportlonment, although
the Governor to make the apportlonment, although
the Organic law requires it should be prescribed
by law, as provided for in said 15th section, after
the Second Legislative Assembly this 15th see, prescribing the apportionment of that Legislature
and all future ones, until a new apportionment
should be made according to law, seems to have been wholly disregarded both by the Governor and subsequent Legislators in the composition of subsequent Legislative Assemblies, although still unrepealed and in full force. This anomalous chapter 14 seems to have provided those two chapter 14 seems to have provided those two methods of apportionment—the one by law, as required by the 'rganic act, the other by Executive action, forbidden by that act. The latter course seems to have been selected and acted upon. This legislative action is a manifest attempt, on the part of the legislature to delegate an obvious general legislative power, that of apportioning the members of its own body, to the Executive, and that, too, against the express provisions of the Organic act requiring

aponsible frame work of the government changed But it cannot be thus done. Such a course is apon every principle of sound law, forbidden, as not only against a firmly established legal maxim that delega to protestanon protest delegare but also the positive requirements of the Organic law. These principles are illustrated and enforced by the following cases from among many others: Bartow vs. Himrod et al 4 Seiden Rep. 483. Thorn vs. Cramer 15 Barber, Rep. 112. Beardsiy vs. Baxter, 15 Barber, 22. Car-ming vs. Green 22 Barber 33 & 50 5 Col. Rep. 113. In the case of Bartow vs. Himred just referred to the Court of Appeals in New York held the act estab-lishing free schools throughout the State uncoustitutional and void for the reason that the fact of its becoming a law was made to depend on the result of a popular vote. The Court in its opinion in that case, say: Laws must be enacted by the legislative case, say: Laws must be enacted by the legislative body to which the legislative power is committed by the constitution. They cannot divest themselves of the responsibility of their enactments by a reference of the question of their passage to their constituents, the people. The objections say the Court, to this mode of legislation is that the legislative discretion is a power which they are bound to exercise themand which they cannot delegate or communi cate to any other man or men to exercise :- they bave no more authority to refer such a question to the whole people than to an individual. The prople are sovereign but tqeir sovreignty must be exercised in the mode which they have pointed out in their constitution. A fortiori in the the case under consideration the legislative authority of Arizona cannot delegate its power of making and prescribing the apportionment to the Executive, when that duty, by the Organic act, is expressly required to be done by the law-making power, and which can only act in the form of Ia law. The case in the 5 Cal Rep above referred to arose under the ad sec of the con-stitution of that State, which provides that a jury trial may be waved by the parties in all civil cases in the manner to be prescribed by law. In the code of that State (purporting to give effect to this clause of the Constitution) concerning civil cases it is prescribed that the courts may prescribe by rule what shall be deemed a waiver of the trial by jary. On the question as to the constitutionality of the statute the Supreme Court of that State says: The constitution has imposed the power as well as the duty upon the legislature to determine in what cases a trial by jury may be waived, which cannot be transferred or dele gated to any other department of government. words "prescribed by law" look to actual legislation upon the subject and in no just sense can be extended to a permission for the exercise of their power another. Besides the power to prescribe by law a legislative and cannot be confered on judicial or oth er officers, as has already been before decided by us. This reasoning with all its force applies to the legis lative power under the Organic act, and the legisla-tive power therein granted can only be exercised in anner pointed out in that act; which act is to the Territory in fact its law and constitution. The Organic act creates and imposes on the law-making power of the Territory the duty of apportionment by the same terms and in the same language as it does the duty of fixing the time, place and manner of conducting the general election and all in ianguage too obviously plain and unambiguous to admit of any doubt as to its force and effect. With equal opriety might the Legislature have attempted to delegate to the Executive the power of fixing the time, place and manner of holding and conducting elections and indeed the whole legislative power of the Territory as that of making or prescribing the apportionment of members of the legislature. This view of the case need but be stated to show the pal-pable absurdity of such a practice, nor can the requirements of the Organic act be complied with by anything short of a law itself making the apportionment as required both by the letter and manifest in-tent of the Organic act. But again this is a manifest attempt (whether intentional or not) on the part of the legislative power and against a clear prohibition. to authorize the Executive Department of the same government to do a legislative act which the Organic aw affirmatively requires should be done by the legislative power. In whatever light this act of the Territorial Legislature is looked at it is in manifest conflict with the Organic law and therefore void; for when a legislative act of the Territory is in conflict with its Organic law it is to be measured and tested by the same rule that controls State legislation when found in conflict with the constitution of the State. for the Organic law is to a Territory its constitution

on the contrary was in manifest conflict with it, un warranted by law and void. As a necessary consequence the legislative assembly so apportioned was unauthorized by law and destitute of any legislative authority to legislate for the Territory of Arizona. 2d. Was the act of the legislative council of the year 1866 purporting to change the time of holding the general election from the first Wednesday of September to the first Wednesday of June, a valid legislative act? in fine had it the force of law.

and all legislation in conflict with it is void. The act of the first Legislature of the 10th of November, 1864, purporting to authorize the Governor to appor-

tion the members of the legislature being thus in manifest conflict with the Organic law is inoperative

and void and gave no such authority. From the full view of the whole of this part of the case the Court

is compelled to the inevitable conclusion that the ap-

portioning of the third legislative council by the Governor was not a compliance with the Organic

mpetent valid act under its prov

The view already taken of the previous question makes it unnecessary to pursue this into any detail.

The third legislative assembly being destitute of legislative power—that having lapsed for want of compliance with the requirements of the Organic law in its composition by the Governor, the act purporting to change the time of holding the general election from the first Wednesday of September to th Wednesday of June as a necessity was and is void and inoperative as law, the Organic law requiring that the time, place and manner of holding elections should be prescribed by law. It follows that as the should be prescribed by law. It follows that as the act of the third legislative council purporting to change the time of holding the elections from the first Wednesday of September to the first Wednesday of June not having for the reason above stated the force and effect of law the time of holding any valid election was therefore unchanged and a valid election could only be held on the first Wednesday of September. The election of the Respondent to the office of Recorder of the county of Pima being held on the first Wednesday of June was therefore wholly unanthorized and void and gave to him no legal title to the office. Judgment must be entered for the Territory.

ritory.

Judgment is so ordered.

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of the removal.

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